MOTION FILED
APR 20 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1583

ALLSTATE INSURANCE COMPANY,
AN ILLINOIS CORPORATION,
Petitioner,

vs.

FRANK J. KELLEY, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, ET AL.,
Respondents.

ON A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

MOTION FOR LEAVE TO FILE AND BRIEF AS AMICI CURIAE BY THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS AND THE ALLIANCE OF AMERICAN INSURERS.

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Now Come the National Association of Independent Insurers and the Alliance of American Insurers, through their counsel of record, Thomas J. Weithers, and move this Court for leave to file the attached brief as *amici curiae* in this case. Counsel for the petitioner, and counsel for the respondents, State Farm Mutual, Aetna Casualty and Surety Company, The Travelers Indemnity Company, Hartford Accident & Indemnity

Company, Continental Casualty Company, the Home Insurance Company, Detroit Automobile Inter-Insurance Exchange and Riverside Insurance Company have consented to the filing of the attached brief. The consent of counsel for respondents Catherine Shavers, et al. (plaintiffs), Frank J. Kelley, Attorney General of the State of Michigan, Richard H. Austin, Secretary of State of Michigan, Daniel J. Demlow, Commissioner of Insurance of the State of Michigan and League General Insurance Company was requested, but refused.

The National Association of Independent Insurers and the Alliance of American Insurers are trade associations with a combined membership in excess of five hundred insurance companies. The interest of the National Association of Independent Insurers and the Alliance of American Insurers as *amici curiae*, which is set forth in more particularity at pages 1-3 of the attached brief, is in the effect of a potential misapplication of the Due Process clause of the Fourteenth Amendment to the Constitution of the United States to insurers of many or most of the states other than the State of Michigan.

The opinion of the Supreme Court of Michigan in this case enunciates a novel proposition, never recognized by this Court, by any United States Court of Appeals, or by any other state supreme court. If the interpretation given to the Fourteenth Amendment by the Supreme Court of the State of Michigan is followed by the Courts of Appeals and the supreme courts of other states, the requirements of procedural due process will be directly imposed upon all insurers which provide any form of insurance required by state law.

The effect of such an imposition would be to create unnecessary and costly procedures ostensibly to protect insured persons whose interests are already protected by comprehensive statutory regulation by the individual states. The adverse impact upon the insurance industry and the insured public arising from an application of the decision of the Supreme Court of Michigan is set forth more fully in the attached brief.

The issue of the application of procedural due process under the Fourteenth Amendment to the Constitution of the United States to the purchase of automobile insurance has not been adequately heretofore presented by the parties. The issue was raised, *sua sponte*, by four of the justices of the Supreme Court of the state of Michigan after the filing of briefs and oral argument in that court (see dissenting opinion of Justices Ryan, Coleman and Fitzgerald.)

This issue, and its potential application to the purchase of insurance in other states, is both relevant and central to the disposition of this case.

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April 19, 1979

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ON A PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

BRIEF OF THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS AND THE ALLIANCE OF AMERICAN INSURERS AS AMICI CURIAE.

INTEREST OF AMICI CURIAE.

The National Association of Independent Insurers ("NAII") is a trade association of over four hundred insurance companies and the Alliance of American Insurers ("AAI") is a trade association of approximately one hundred insurance companies. The members of both associations write property and casualty insurance not only in the state of Michigan but in each of the

other forty-nine states. Many of the member companies write such insurance in all fifty states. Other members write insurance on a regional or local basis.

The *amici curiae* have requested leave to file this brief because of the potential effect that the decision of the Supreme Court of Michigan may have on the interpretation of insurance laws throughout the United States and the impact of such interpretation on the business of insurance companies. The opinion of the Supreme Court of Michigan mandates a direct application of procedural due process under the Fourteenth Amendment to the Constitution of the United States to all insurance transactions wherein the insurance purchased is made compulsory by state law.

The opinion of the Supreme Court of Michigan, if not reversed by this Court, may be readily adopted by other state supreme courts and by the Courts of Appeal. The Michigan opinion brings into direct question the constitutional validity of all compulsory insurance laws in the United States. It can also be expected that the decision will be an impediment to the passage of no-fault statutes in states which have not yet enacted such statutes. The doctrine espoused by the Supreme Court of Michigan would necessarily evolve over a long period of time on a case-by-case basis creating enormous uncertainty as to the requirements imposed upon insurance companies. The rationale of the Michigan opinion, if followed, will extend court supervised due process requirements to a competitive industry and lead to wasteful procedures the cost of which will ultimately be borne by the consuming public.

The *amici curiae* believe that the national import of the decision of the Supreme Court of the State of Michigan for the insurance industry and individual companies engaged in competitive marketing may not be adequately presented by the parties hereto and is important to the ultimate disposition of this case. The question of procedural due process under the Fourteenth Amendment to the Constitution of the United States as related

to the purchase of insurance was not presented to the Supreme Court of the State of Michigan by the parties hereto. It was raised, *sua sponte*, by four of the justices after the filing of briefs and oral argument in that Court.[1]

Question Presented.

Whether the Supreme Court of the State of Michigan correctly held that whenever a state requires a resident of that state to purchase insurance as a requirement to the registration of an automobile the private supplier of insurance is engaged in state action and the Fourteenth Amendment to the Constitution of the United States therefore mandates full procedural due process to the purchaser of said insurance?

I.

THE DECISION OF THE SUPREME COURT OF MICHIGAN IF NOT REVERSED BY THIS COURT, WILL BE REGARDED AS A PRECEDENT TO BE FOLLOWED BY THE SUPREME COURTS OF OTHER STATES AND BY THE COURTS OF APPEAL.

The Supreme Court of the State of Michigan has enunciated a novel proposition of constitutional interpretation relating to the sale of insurance heretofore neither presented to nor decided by this Court. This Court has previously recognized the need to grant certiorari under such circumstances. *Pernell* v. *Southall Realty*, 416 U. S. 363, 40 L. Ed. 2d 198, 94 S. Ct. 1723 (1974); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 53 L. Ed. 2d 965, 97 S. Ct. 2849 (1977).

By declaring the Michigan legislative scheme for no-fault insurance to be violative of the Fourteenth Amendment insofar as it provides for the purchase of compulsory insurance, the holding of the Supreme Court of Michigan brings into question

1. *Shavers* v. *Kelley*, 402 Mich. 554, 267 N. W. 2d 72, 106, 118, 120 (separate opinions of Ryan, Fitzgerald and Coleman, JJ.)

the constitutionality of compulsory insurance statutes in twenty-four states. Under similar circumstances this Court has previously granted the writ. *New York* v. *O'Neill*, 359 U. S. 1, 3 L. Ed. 2d 585, 79 S. Ct. 564 (1959).

In arriving at its decision, the Michigan Supreme Court relied upon its misinterpretation of this Court's opinion in *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974). Such misinterpretations of this Court's decisions have previously militated in favor of granting the writ. *Oregon* v. *Mathiason*, 429 U. S. 492, 50 L. Ed. 2d 714, 97 S. Ct. 711 (1977); *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650, 13 L. Ed. 2d 580, 85 S. Ct. 614 (1965).

Furthermore, it can be reasonably predicted that the Michigan holding will provide a basis for considerable litigation in many, if not most, of the states. It may be many years before this Court again has an opportunity to review such an interpretation of the Fourteenth Amendment. This Court's review at this time may serve to prevent needless and wasteful litigation of this issue in years to come.

It is self-evident why this Court must be the final source of interpretation of the Constitution.[2] The same reasons compel this Court to be ever alert to the possibility of misinterpretation of the Constitution by state courts and the ills which might flow therefrom.

II.

THE DECISION OF THE MICHIGAN SUPREME COURT, IF NOT REVERSED, WILL SERVE AS A PRECEDENT FOR SIMILAR RULINGS IN OTHER STATES, WILL IMPEDE THE PASSAGE OF NO-FAULT STATUTES IN OTHER STATES AND WILL HAVE A NEGATIVE EFFECT ON THE MARKETING OF INSURANCE.

The opinion of the Supreme Court of Michigan calls into question the constitutional validity of all compulsory insurance

2. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 347-48, 4 L. Ed. 97, 108 (1816).

laws in the United States. To date, twenty-four states, other than Michigan, have statutes requiring compulsory automobile insurance.[3] If the full requirements of procedural due process under the Fourteenth Amendment are applied to the competitive marketing of compulsory insurance in these states, it is possible that each such statute may be found to be unconstitutional.

Another immediate effect of the decision of the Michigan Supreme Court will be to deter the passage of further no-fault laws in any additional states. Currently, twenty-three states, in addition to Michigan, have enacted no-fault laws.[4] Most no-fault automobile insurance reparation plans depend upon the requirement of compulsory insurance. If the marketing of no-fault insurance is subject to the full panoply of procedural due process, state legislatures will be understandably reluctant to enact no-fault statutes. The effect of the Michigan decision on further reform of the automobile reparation system could prove to be disasterous.

The Michigan court's interpretation of due process would also increase uncertainty in insurance marketing and regulation by casting doubt upon the constitutionality of many of the present state regulatory mechanisms.

Moreover, the imposition of constitutional requirements on insurance marketing would doubtless give rise to considerable private litigation based upon alleged violations of due process.

The *Shavers* opinion also is contrary to the present trend toward de-regulation of industries (*i.e.*, airlines, oil companies,

3. California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina and Utah. (This listing does not include the numerous states which have financial responsibility laws which may also be invalidated if the reasoning in *Shavers* is followed.)

4. Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New York, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah and Virginia.

railroads and the trucking industry) for the purpose of increasing competition. The Michigan decision would require additional and court-supervised regulation over one of the most competitive industries in this country. At the present time, automobile insurers are regulated by comprehensive insurance codes in fifty states.

A recent study by the Antitrust Division of the Department of Justice determined that rigid state rate regulation has had adverse effects on competition in the field of insurance.[5] Among the effects noted in the study are the discouragement of rate reductions, establishment of various forms of cross-subsidization between good and bad risks and the aggravation of the availability of insurance which marginal or high risks have difficulty in obtaining in the open market at the prevailing rates.[6] The study prescribes more competition which implies less regulation.

The Michigan opinion would extend additional regulation under the guise of due process. If other states were to follow this decision, there would be an inhibiting effect on the increased competition suggested by the Department of Justice and others. Such totally unnecessary constitutional safeguards will require each insurer to scrutinize all applicants critically. The natural reluctance of the carriers to write any undesirable drivers will be considerably enhanced by the decision. The carriers would be overly cautious in expanding their business in any state adopting the Michigan rationale thereby lessening competition within the industry. In addition, carriers will be deterred from experimentation with new types of coverage, which by their very nature, require carefully controlled and selective underwriting.

Direct application of due process procedural safeguards to a competitive private industry such as the insurance industry is not only unnecessary but will also be wasteful and costly. For

5. Antitrust Division, U.S. Dept. of Justice, Federal-State Regulation of the Pricing and Marketing of Insurance, American Enterprise Institute of Public Policy Research 89 (P. MacAvoy ed. 1977)

6. *Id.*

example, the Supreme Court of Michigan has held, in its "minimum" requirements for due process, that each person purchasing automobile insurance in Michigan (some 6,000,000) be accorded an administrative review of the manner in which insurance rates are applied to his individual premium charge.

Nor are the ramifications of the Michigan court's decision limited to the insurance industry. The Supreme Court of Michigan reasoned that because: (1) insurance is a prerequisite to the registration of an automobile in Michigan; and (2) the registration of an automobile is a prerequisite to the utilization of a driver's license; and (3) the right to a driver's license is constitutionally protected, that it is therefore necessary to provide due process protection for the purchaser of insurance.

If the logic of the Michigan Supreme Court is applied to other requirements for the registration and operation of a motor vehicle, numerous industries will be subject to due process supervision by the courts as to their pricing and marketing. For example, many states require that certain drivers can validly utilize their driver's license only while wearing eye-glasses. The Michigan opinion, applied to such a requirement, would mandate that the courts, under due process requirements, supervise the marketing of eye-glasses because they are a necessary prerequisite to the utilization of a driver's license. The same analogy would hold for requirements of side-view mirrors and of any other automobile equipment required by statute. Such an application of the court's reasoning to other products demonstrates on the one hand the enormous mischief that would result from its application; and on the other hand, the error of extending due process to private entities engaged in a competitive industry.

The rationale of the Supreme Court of the State of Michigan could readily be adapted by other states to the sale of any service or product required under state law and not limited to automobile insurance or to automotive products. Such an adaptation of the Michigan rationale would obviously be a fruitful source of civil litigation, probably on a class action basis, which

would seek the imposition of procedural due process upon business entities engaged in competitive industries. Such a result is neither practically necessary nor constitutionally defensible.

III.

THE SUPREME COURT OF MICHIGAN CLEARLY ERRED IN APPLYING FULL DUE PROCESS REQUIREMENTS TO EVERY COMPANY IN A PRIVATE, COMPETITIVE INDUSTRY. THE ERROR AROSE FROM THE COURT'S MISAPPLICATION OF THIS COURT'S HOLDING IN THE JACKSON CASE AND HAS EXTENDED DUE PROCESS REQUIREMENTS TO AN EXTENT NEITHER AUTHORIZED NOR CONTEMPLATED BY THIS COURT.

The Supreme Court of Michigan has interpreted the Fourteenth Amendment in a manner and to an extent never authorized by this Court. The *Shavers* opinion imposes full due process requirements upon every automobile insurance company doing business in the State of Michigan. The opinion does so even though the insurance companies are individually selling insurance in a competitive market.

The majority opinion of the Michigan court arrived at this extraordinary result by misreading and misapplying this Court's holding in the *Jackson* case.[7]

It is fundamental that the due process requirements of the Fourteenth Amendment apply only to governmental entities, or to private entities engaged in "state action".[8] This Court has never found state action by a private entity unless (1) the entity was performing an activity which was traditionally an exclusive public function;[9] or (2) the activity of the private entity was

7. *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974).

8. *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 32 L. Ed. 2d 627, 92 S. Ct. 1965 (1972).

9. *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149, 56 L. Ed. 2d 185 (1978).

either compelled or encouraged to such an extent that the activity was transformed into state action;[10] or (3) the activity challenged was so connected with the action of the state that the conduct was attributable to the state for purposes of the Fourteenth Amendment.[11]

The selling of insurance by individual insurers in the State of Michigan is an activity which does not fit within any of the categories of conduct delineated by this Court.

(1) The sale of automobile insurance is not an activity which has been traditionally an exclusive function of the state and therefore cannot be considered state action.

(2) The sale of automobile insurance by individual insurers is neither compelled nor encouraged by Michigan law. Insurers are free to sell automobile insurance or not to sell automobile insurance in the state of Michigan. The Michigan court noted that insurers are free under the subject legislation to accept or reject certain risks. Thus the compulsion or encouragement by the state which could conceivably give rise to state action is totally absent.

(3) The sale of automobile insurance by a private insurer is not so connected with the state that the sale transactions "may be fairly treated as that of the state itself."[12] The opinion of the Supreme Court of Michigan presents many impediments to analysis, but the court apparently relied on this test for its state action holding and cited only the *Jackson* case in support of its holding.

The *Jackson* case not only does not support the holding of the Michigan court but stands in direct contradiction. In *Jackson* this court rejected the argument that because the challenged activity was conducted by a monopoly, the activity constituted

10. *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 170-171, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970).

11. *Jackson, supra,* at 358-359.

12. *Jackson, supra,* at 484.

state action. Yet the Michigan court, ostensibly relying upon *Jackson*, determined that the sale of automobile insurance in a competitive market does constitute state action.

Not only did the Michigan court misapply the test in *Jackson*, but it did so without any basis for its misapplication. None of the over two hundred fifty insurance companies writing automobile insurance in Michigan enjoys the status of monopoly nor do the companies collectively constitute a monopoly since other companies are free to compete in the insurance market. The marketing of insurance by individual companies in the competitive market is so far removed from governmental action that it simply cannot be considered state action.

In summation, the Michigan court while ostensibly relying on *Jackson*, has purported to find "state action" where none exists under the teachings of this Court. The lack of foundation for such a holding was duly noted by the three dissenting Justices.[13]

In so holding, the majority opinion of the Supreme Court of Michigan has imposed upon individual insurance companies greater restrictions as a matter of federal constitutional law than this Court has, contrary to this Court's holdings.[14]

The majority opinion of the Supreme Court of Michigan, in purporting to interpret the Fourteenth Amendment, has not only totally misapplied the holdings of this Court, but has done what this Court never authorized. The Michigan opinion has imposed due process requirements on each individual insurance company selling automobile insurance in the State of Michigan. The Michigan court has imposed due process requirements, in

13. *Shavers, supra,* 267 N. W. 2d at 106, 118, 120.

14. "But, of course, a state may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them. See *Smayda* v. *United States,* 352 F. 2d 251, 253 (CA9 1965), cert. denied, 382 U. S. 981, 15 L. Ed. 2d 471, 86 S. Ct. 555 (1966); *Aftanase* v. *Economy Baler Co.,* 343 F. 2d 187, 193 (CA8 1965)." *Oregon* v. *Hass,* 420 U. S. 714, 43 L. Ed. 2d 570, 95 S. Ct. 1215 (1975).

effect, upon an entire industry. It has done so despite the fact the marketing of insurance is neither a function traditionally performed by the sovereign nor an activity compelled by the state nor an activity which is so intimately connected with the activity of the state that it becomes state action.

The principle that hundreds of insurance companies operating in a competitive market and under extensive state regulation are engaged in "state action" so as to require court imposed due process requirements may be adopted by other courts, unless corrected by this Court. The spread of the novel doctrine created by the Michigan court's opinion will result in extensive litigation in state and federal courts, in a total uncertainty among insurance carriers as to the legality of their marketing practices, and in incredible, unnecessary burdens upon insurance carriers which will ultimately, of necessity, be paid for by the consuming public.

CONCLUSION.

For the above reasons, it is respectfully submitted that this Court issue a writ of certiorari to the Supreme Court of Michigan.

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